No. 93-528

In The

Supreme Court of the United States

October Term, 1993

GESKE & SONS, INC.,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner waived its argument that the trial court applied the wrong legal standard by raising it only for the first time on appeal, particularly where the state law standard applied by the trial court was that which Petitioner itself advanced and where the trial court denied Petitioner injunctive relief by application of a state law standard more favorable to it.

2. Whether state law libel claims based upon the language of picket signs are preempted by federal law.

3. Whether the trial court erred in denying Petitioner preliminary injunctive relief after hearing no evidence to support a finding that Respondents acted with actual malice.

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STATEMENT OF THE CASE

A. Procedural History

On September 5, 1991, Plaintiff-Petitioner, Geske & Sons,

Inc., filed its original and then its first amended "Verified Complaint For Temporary Restraining Order, Preliminary and Permanent Injunctions, and Damages" against the Union Defendants and their agents including International Union of Operating Engineers, Local 150, AFL-CIO, Respondent here. There the Company alleged Illinois common law claims of trade libel, tortious interference with contractual relations and tortious interference with the prospective business advantage (Appendix to Petition for Writ of Certiorari at 21a). Based upon that complaint, the Company sought and obtained an *ex parte*, after hours, temporary restraining order against certain of the Union's purported conduct.

On September 6, 1991, the Union Defendants filed with the state court their notice of removal to the United States District Court for the Northern District of Illinois (Petitioner's Appendix at 27a). There the Union asserted that the Company's claims were preempted by federal labor law (Petitioner's Appendix at 28a). Acknowledging that the Union might ultimately prove federal preemption, the district court nevertheless remanded the case on the ground that the Company's complaint did "not on its face contain a federal claim" (Petitioner's Appendix at 29a). That order was, of course, not appealable. 28 U.S.C. § 1447(d).

On September 12, 13, 20, 23, 24, 25, and 26, 1991, the trial court heard Petitioner present eighteen (18) witnesses in support of its motion for preliminary injunction. On September 27, 1991, the Union moved for a directed finding under the Illinois Code of Civil Procedure ch. 110 ¶ 2-1110. The trial court found *inter alia* the Company's likelihood of success on the merits of its trade libel and tortious interference claims to be "small" (Petitioner's Appendix 18a); and that the terms of the Illinois Anti-Injunction Act (Ill. Rev. Stat. ch. 48 ¶ 2a) also precluded injunctive relief (Petitioner's Appendix 22a).

On October 15, 1991, the Company filed an interlocutory appeal of the trial court's denial of injunctive relief. (Proceedings in the trial court have been stayed pending exhaustion of Petitioner's admittedly dispositive appeal.) On appeal to the Illinois Appellate Court, the Company argued for the first time that the state law trade libel standard which it advanced and which the trial court applied in denying the Company injunctive relief was incorrect and that its claim should instead be assessed under the "actual malice" standard applied to allegedly defamatory speech made in the course of labor disputes under *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496 Letter Carriers v. Austin*, 418 U.S. 264 (1974) (Petitioner's Appendix at 6a; Petition for Writ of Certiorari at 12 fn. 7, "Geske respectfully submits that the observation [that it raised this argument for the first time on appeal] is *not* incorrect . . ." (emphasis added)). On September 29, 1992, the appellate court rejected the Company's belated effort to change the standard it wanted applied to its claims and affirmed the decision of the trial court. On January 5, 1993, the appellate court denied rehearing on the matter. On June 3, 1993, the Illinois Supreme Court denied the Company's petition for appeal as a matter of right or for leave to appeal (Petitioner's Appendix 25a).

B. Statement of Material Facts

Local 150, International Union of Operating Engineers, AFL-CIO is a labor organization representing employees of employers engaged in the heavy construction and material production industries throughout northern Illinois and Indiana. Geske & Sons, Inc., is a producer of asphalt and a road building contractor operating within Local 150's territorial jurisdiction. On August 19, 1991, Local 150 began picketing Geske & Sons in an effort to obtain recognition from the Company as the exclusive collective bargaining representative of its employees. Towards that end, until September 17, 1991, the Union stationed picketers across the street

from the Company's asphalt plant entrance; at various of its job sites; and followed certain of its supply trucks to their sources of supply where it stationed picketers. Throughout that time the picketers carried or fixed in the ground signs which read: "Local 150, IUOE On Strike Against Geske & Sons For Recognition As Majority Bargaining Representative Of Company's Operating Engineer Employees."

In support of its litigation efforts to stop the Union's picketing, the Company filed suit in state court seeking injunctive relief alleging variously that the Unions were "physically blocking" (Complaint ¶ 14) access to the Company's premises; threatening their customers with physical violence and damage to their property (Complaint ¶¶ 10, 19, 22); and libeled their business by falsely claiming that the Company's own employees were on strike (Complaint ¶¶ 20, 26-27).

Despite the voluminous record created by the Company in its effort to secure a preliminary injunction, however, the trial court found no evidence of physical violence attributable to the Union; no evidence that unlawful trespass or blocking of vehicles had occurred; and no evidence of threats other than the admitted *economic* threat posed by pressure from the Union (Petitioner's Appendix 19a-21a). Indeed, the Company so utterly failed to support its allegations that its counsel conceded in oral argument before the trial court that there had been no violence during the picketing (Vol. IX at 1302). Moreover, the trial court simply rejected the interpretation of the Union's picket sign advanced by the Company (Petitioner's Appendix 18a).

As the trial court found, careful examination of the record in this case reveals the Company's assertions to be all exaggeration and prevarication. Union representatives never suggested that Geske's own employees were on strike; pretended that they themselves were Company employees; or in any way threatened or

endangered the safety of Company employees, its customers or the integrity of their property. The Company's reliance in its petition on allegations from its complaint rather than the voluminous record or the conclusions of the trial court dramatically exposes the paucity of its evidence.

C. Petitioner's Misstatements

The Company's entire Petition is a misstatement of the record, proceedings and decision of the trial court. It is, at best, disingenuous; at worst, dishonest. Consistent with the obligation to reference specific misstatements, Supreme Court Rule 15.1, Respondent points out the most egregious misstatements of the Petitioner as follows. First and foremost, *nowhere* in the pleadings or the record can the Company support its assertion that the Union claimed it represented Geske employees and that they were striking (Petition at 3-6). In fact, the Union's picket sign expressly stated that it was striking the Company for recognition as the representative of the Company's employees, plainly acknowledging its status as a third party. The Company offers three record references to support that assertion. That testimony is, however, consistent with the language of the picket signs: the *Union* is striking for recognition and that the Company's operating engineers wanted to be represented by it.

Next, contrary to the reference in footnote 2 (Petition at 6), the NLRB conducted no "representation proceeding" in the form of an evidentiary hearing and certainly none that included Local 150. Indeed, transcript references in this case reveal several heavy equipment operators in the employ of the Company (Tr. Vol. I at 19; Tr. Vol. V at 365). Nor did Local 150 representatives ever testify that they believed the picket signs would be understood as indicating Geske's own employees were on strike. Union Business Agent Mike Quigley testified that in 1987, picket signs said "on strike" when he and other workers struck for a contract (Vol. 8 at

1110-1111). The Company's reliance on this testimony is typical of their desperate efforts to distort the record to support their claims. Similarly typical is their purported "evidence" of violence by the Union. Despite the Company Attorney's admission that there was no violence and the trial court's express finding to that effect (Petition at App. 19a), the Company tries to paint a picture of danger and destruction (Petition at 6-7). These statements are simply false and should be rejected as such. The record in this case plainly reveals that the Union's conduct was at all times peaceful within the boundaries of state common law and federal labor regulation. The Company's efforts to portray it as otherwise in support of an exotic libel claim are reprehensible and should end now.

REASONS FOR DENYING THE WRIT

I.

THE COMPANY WAIVED ITS ARGUMENT THAT THE STATE COURT FAILED TO APPLY THE FEDERAL STANDARD ARTICULATED IN *LINN V. PLANT GUARD WORKERS* BY FAILING TO MAKE IT IN THE TRIAL COURT WHERE IT CONSISTENTLY ADVANCED A STATE LAW STANDARD.

Petitioner Geske & Sons brought its claim in state court under Illinois common law alleging trade libel, tortious interference with contractual relations and with prospective business advantage (Petitioner's Appendix 27a). Although it argued the applicability of the "actual malice" standard, it was careful to couch this argument in terms of state law. The Company opposed removal to the federal district court and that court agreed that it had raised only state law claims which carefully avoided any prayer for relief based on federal law (Petitioner's Appendix 28a). The trial court fully considered the Company's arguments couched in terms of

state law (Petitioner's Appendix 16a-18a) and rejected them.

Now the Company asserts that the trial court's failure to examine its claims expressly under the standard articulated by this Court in *Linn v. Plant Guard Workers*, 483 U.S. 53 (1966) is error. The Illinois Appellate Court rejected this argument at least in part on the ground it was advanced "for the first time on appeal" (Petitioner's Appendix 6a). The Company acknowledges the truth of this observation (Petition at 12 n. 7), but tries to excuse it by saying that in its motion for temporary restraining order it argued that the standard was one of actual malice as adopted by the Illinois courts in *Lowe Excavating Co. v. IUOE, Local 150*, 180 Ill. App. 3rd 39, 535 N.E. 2d 1065 (2nd Dist. 1989); and that it "must still be allowed as the question raises an issue of subject matter jurisdiction." Both these arguments are misleading and without merit.

The Company's strategy is a legal version of the old shell game: while in state court it couches its theories within state common law jurisprudence, careful to avoid any reference to federal law so as to defeat removal (Petitioner's Appendix 26a-30a). Now that it seeks relief from the Supreme Court, it argues the lower courts erred in failing to apply federal law. The Company cannot advance one theory in the trial court, convince the court to apply the law as it frames the issue, then claim legal error once it loses. Such a strategy is contrary to law and fundamentally unfair and should be rejected by this Court. Nor is a question of jurisdiction raised by the Company. Whether framed as state common libel law or a labor dispute requiring proof of actual malice, the state court retains jurisdiction. *Linn*, 383 U.S. at 61. The Company's "jurisdictional" argument is just another phoney excuse to obtain review by this Court, and should also be rejected.

II.

PETITIONER'S STATE LAW LIBEL CLAIMS ARE PREEMPTED BY FEDERAL LAW.

"States may not regulate activities that the NLRB protects, prohibits, or arguably protects or prohibits." *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 286 (1986); *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245 (1959). Picketing for organization or recognitional purposes is protected by Section 7 of the NLRA. *Sears Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180, 194 n. 24 (1978); *NVE Constructors, Inc. v. NLRB*, 934 F.2d 1084 (9th Cir. 1991). For purposes of the NLRA, moreover, picketing has been equated with striking in protecting the methods of economic pressure available to unions. *Id.* at 1086 and n. 3; 29 U.S.C. § 163.

Here, the Union's picket signs expressly proclaim its object of securing recognition as the bargaining representative of the Company's operating engineer employees. This conduct is, therefore, protected under the NLRA and as such not subject to state regulation under the doctrine of federal preemption.

The Company argues that the federal libel standard applied to labor disputes as articulated in *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) should be used to determine whether its claims against the Union and its picket signs are actionable. Its theory, however, is fundamentally different from that advanced in *Linn*. There, an employer's official sued various union officials and a company employee for allegedly libelous statements made in the course of an NLRB supervised representational election campaign. 383 U.S. at 55-56. Those statements included allegations that Linn and other company managers were "lying" to company employees, had "robbed" them of pay increases and warned that "Somebody may go to Jail!" 383 U.S. at 56. Such

statements are the stuff of which libel claims are traditionally made. By contrast, federal law regulating representation campaigns expressly tolerates misrepresentations by the parties. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). In balancing the rights of parties to labor disputes to "often speak bluntly and recklessly" in such "ordinarily heating affairs," against the individual right to be protected against injury from "defamatory or insulting material known to be false," *id.* at 61, the Court in *Linn* permitted the state courts to retain jurisdiction over such statements provided plaintiffs could prove actual malice. As the Court explained, "Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the board's jurisdiction over the merits of the labor controversy." *Id.* at 64.

Here, by contrast, the Company plainly asks this Court to inject itself into the merits of the labor controversy and judge the Union's objectives by interpreting the language of its picket signs and the meaning of its "on strike for recognition" message. As such, it is distinct from the traditional libelous statements which were the object of the controversy *Linn*, and are preempted by the exclusive jurisdiction of the NLRB.

III.

THE TRIAL COURT DID NOT ERR IN DENYING PRELIMINARY INJUNCTIVE RELIEF WHERE THE COMPANY FAILED TO PRESENT EVIDENCE THAT THE UNION'S STATEMENTS ON ITS PICKET SIGNS WERE FALSE, OR PUBLISHED WITH KNOWLEDGE OF THEIR FALSITY OR RECKLESS DISREGARD FOR THEIR TRUTH.

Although the Company never argued in the trial court that *Linn v. Plant Guard Workers* was the controlling standard to be

applied to its trade libel claims, it did argue that the Union statements were made with "actual malice" (Motion For Temporary Restraining Order and Preliminary and Permanent Injunction, ¶ 9). Indeed, throughout its pleadings, the Company asserted that the Union "knew that the statement contained on the [picket] signs was false and misleading. Alternatively, Local 150 should have known that the statement contained on the signs was false and misleading and, therefore, acted in reckless disregard for its truth or falsity" (Complaint ¶ 13).

The court rejected the Company's claims principally because the Company's interpretation of the signs is wrong (Petitioner's Appendix 18a). The Union's statement that it is striking the Company for recognition as majority representative of the Company's operating engineer employees, is truthful on its face and, therefore, cannot be known to be false. Even if the Company could avoid this logic, it failed to do so. The Company offered eighteen (18) witnesses over seven (7) days of evidentiary hearings. It fully articulated the substance of the standard it now advances, and fully apprised the court of how that standard should be applied to the evidence. It simply failed to prove its case. The court's findings were not clearly erroneous and no basis for review of its decision by this Court has been offered. *See, e.g., Doyton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Guzman v. Pichirilo*, 369 U.S. 698 (1962).

CONCLUSION

For all the above reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari to the Illinois Appellate Court for the Second Judicial District.

Respectfully submitted,

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